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IN THE

Supreme Court of the United States

October Term, 1965

No. 602

PAUL RHODES,

Petitioner,

vs.

CHARLOTTE EDWARDS and JACK EDWARDS,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEBRASKA

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petition of Paul Rhodes for a writ of certiorari to be directed to the Supreme Court of the State of Nebraska, to review a judgment of that court entered on the 21st day of May, 1965, rehearing denied on the 2nd day of July, 1965.

OPINION BELOW

The opinion appealed from is entitled *Paul Rhodes, Appellant v. Charlotte Edwards and Jack Edwards, Appellees,*

and is reported in 178 Neb. 757, and 135 N. W. 2d 453, and is printed in Appendix A hereto, infra, page 14.

JURISDICTION

The opinion and judgment sought to be reviewed was dated May 21, 1965 and July 2, 1965, and was entered of record on that date. Rehearing was denied July 2, 1965 (R. 86).

The jurisdiction of this Court is invoked under the Act of Congress of June 25, 1948, c. 646, 62 Stat. 929, 28 U. S. Code, Sec. 1257 (2) and (3), providing that this Court may, by writ of certiorari, review any final judgment for decree rendered by the highest Court of a State in which a decision could be had, where any title, right, privilege or immunity especially set up or claimed under the Constitution, treaties, or statutes of or commission held or authority exercised under the United States.

THE QUESTIONS PRESENTED FOR REVIEW

1. Whether a State Court can under Rules of Discovery Procedure force a litigant to produce copies of joint income tax returns, where one of the parties to the joint income tax return is not a party to the suit. Thereby publishing said return and making himself liable to prosecution under the laws of the United States, 26 U. S. C., Internal Revenue Code, of the United States, Section 7213 and subject to $1,000.00 fine or imprisonment of not more than one year, or both, where he does not have a copy of said return in his possession. The only known copy of said tax return is in possession of the United States.

2. Whether the order of production of said income tax

return, in the possession of the United States, violates the Fourteenth Amendment of the United States Constitution, and deprives the petitioner of his right to recover on the note, where he fails to produce said copy, and the Court denies him the right to maintain the action and dismisses the action. Whether such action of the Court is a denial of due process of law under the Fourteenth Amendment of the United States Constitution.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

26 U. S. C., Internal Revenue Code of the United States, Section 7213:

> "(a) Income Returns. * * *
>
> "* * * and it shall be unlawful for any person to print or publish in any manner whatever not provided by law any income return, or any part thereof or source of income, profit, losses, or expenditures appearing in any income return; and any person committing an offense against the foregoing provision shall be guilty of a misdemeanor, and, upon conviction thereof, shall be fined not more than $1,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution; and if the offender be an officer or employee of the United States he shall be dismissed from office or discharged from employment."

U. S. Constitution, Amendment XIV, Section 1:

> "* * * nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT

The decision of the Supreme Court of the State of Nebraska in the case at bar is vital to millions of persons in the United States that filed joint income tax returns. It involves the question as determined by the Nebraska Supreme Court, that a taxpayer filing a joint income tax return, and not a party to a law suit can have his tax return published by production and copying, when the only copy is in the possession of the United States. This makes his tax return available to his competitors and enemies alike.

The petitioner instituted this action as a suit on a promissory note (R. 9), thereafter the District Court entered orders for THIS petitioner to produce copies of Joint Federal Income Tax Returns of a person not a party to the suit for the purpose of inspection and copying by the respondents (R. 31, 34, 38, 42, 44, 51, 55 and 57). The petitioner by his petition on the promissory note (R. 9) did not make the nature or amount of his income an issue in the suit. That the undisputed evidence before the court was that this petitioner did not have copies of said joint federal income tax returns in his possession, custody, or control (R. 44, 55) and preserved in the Bill of Exceptions at (R. 3 and 7), and this was the only evidence before the Court. The affidavit at (R. 45) stated, to-wit:

> "1. That he does not have in his possession or control copies of his Federal Income Tax Returns for 1958 and 1959.
>
> "2. That he is unable to secure a copy thereof though he has requested the same from the United States.
>
> "3. That the reply of the United States conditioned its compliance with the request so as to make it im-

possible for this affiant to secure said returns or copies thereof.

"4. That this affiant during said years of 1958 and 1959 made no separate individual tax returns.

"5. That for reasons aforesaid, this affiant was unable to comply with the order of the District Court as to paragraph five of the motion * * *."

That the orders of the Court contained at (R. 33, 34, 45, 47, 55, and 56) required this appellant to produce documents that he did not have in his possession, custody or control.

That the Court dismissed plaintiff's cause of action for failure to produce copies of 1958 and 1959 Federal Income Tax Returns, of Augustine J. Rhodes and petitioner (R. 51); which he did not have in his possession, custody or control. The Court overruled motion for new trial (R. 57). This petitioner raised the Fifth Amendment of the United States Constitution against self incrimination, the Fourteenth Amendment of the United States Constitution, Article 1, Section 3 of the Nebraska Constitution and Section 7213 of the Federal Revenue Code, 26 U. S. C., all of which were overruled by the trial Court. The federal questions presented here were raised in the District Court at the time the Court entered its order, and on motions for modification of said order, and on motion for rehearing. The questions were raised in the Supreme Court by petitioner's Brief, Reply Brief, and Motion for Rehearing.

The questions were raised in the Supreme Court of the State of Nebraska by petitioner's brief, reply brief and motion for rehearing.

REASONS FOR GRANTING THE WRIT

1. The writ should be granted in the case at bar for the reason that the rule of law laid down by the Supreme Court of the State of Nebraska that a person filing a joint federal income tax return must produce a copy for inspection, copying, and publication under rules of discovery procedure. The order would require the production and copying of an income tax return of a person not a party to the litigation.

This would make said returns available to competitors and enemies alike.

This is much more important to the millions of taxpayers that file joint tax returns than the mere six thousand dollars involved in the case at bar. It is important for them to know that their tax returns in the hands of the United States are confidential, and will not be made available to their enemies and competitors at the whim of a Judge in an action where they are not a party to the suit.

2. We must always keep in mind in the case at bar that we are dealing with copies of Federal Income Tax Returns not in possession of the party to the suit, but are dealing with tax returns in the hands of the United States and no copies in the possession of the party to the suit.

We must next keep in mind that the Federal Law makes it a criminal offense (a federal crime) to in any manner for any private person including this appellant to disclose the contents of a Federal Income Tax Return in the hands of the United States. That the criminal provisions apply to all persons not employees of the United States, as well as employees of the United States. The pertinent section

is Section 7213 of the Internal Revenue Code, 26 U. S. C. in part as follows:

> "(a) Income Returns. * * *
>
> "* ** and it shall be unlawful for any person to print or publish in any manner whatever not provided by law any income return, or any part thereof or source of income, profit, losses, or expenditures appearing in any income return; and any person committing an offense against the foregoing provision shall be guilty of a misdemeanor, and, upon conviction thereof, shall be fined not more than $1,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution; and if the offender be an officer or employee of the United States he shall be dismissed from office or discharged from employment."

Thus for Paul Rhodes TO DISCLOSE THE CONTENTS OF THE FEDERAL INCOME TAX RETURN of Augustine J. Rhodes in a suit in which she is not a party would subject him to criminal prosecution under the foregoing section of the Internal Revenue Code, the same is if he were an official of the United States, and subject him to the same penalties as an official of the United States. That permitting the public filing of a Federal Income Tax Return and the copying thereof by strangers is publication in violation of the Federal Law. That the requiring this appellant to furnish said copies of Federal Income Tax Return would make him a criminal and a fugitive from Federal Justice, and subject to prosecution, that for this reason the order of the Court requiring this appellant to produce for copying and inspection copies of such Federal Income Tax Returns would be repugnant and a violation of the FIFTH Amendment of the United States Constitution against self incrimination.

3. First we must keep in mind that the Trial Court

was dealing with copies of Joint Federal Income Tax Returns for the years of 1958 and 1959, which copies were not in the possession, custody and control of this petitioner and did not exist and which are privileged in the hands of the United States of America. First we must look at the controlling Nebraska statute, 25-1267.39, R. R. S. Nebraska 1943, re-issue 1956.

> "Discovery and production of documents for inspection, copying, or photographing. Upon motion of any party showing good cause therefor and upon notice to all other parties, and subject to the provisions in section 25-1267.22, the court in which an action is pending may (1) order any party to produce and permit the inspection, copying or photographing, by or on behalf of the moving party, of any designated documents, papers, books, accounts, letters, photographs, objects, or tangible things, NOT PRIVILEGED, which constitute or contain evidence relating to any of the matters within the scope of the examination permitted by section 25-1267.02 and which are in his possession, custody, or control; or (2) order any party to permit entry upon designated land or other property in his possession or control for the purpose of inspecting, measuring, surveying, or photographing the property or any designated object or operation thereon within the scope of the examination permitted by section 25-1267.02. The order shall specify the time, place, manner of making the inspection and taking the copies and photographs and may prescribe such terms and conditions as are just." (Emphasis supplied by writer.)

It now must be noted that the Statute above only authorized orders as to existing documents and does not provide for the manufacture of non-existent documents at the time of the entry of the order, for production, which did not exist at the date of the order, and in the case at bar there were no such copies of documents which petitioner was ordered to produce, in the possession, custody, or con-

trol of the petitioner at the time of the making of the order for production and the dismissing the appellant's cause of action, and the overruling of the Motion for New Trial. Therefore, the Statute did not authorize the orders entered by the Court, and said orders violate the Due Process of Law clauses of both State and Federal Constitutions, Article 1, Section 3 of the Nebraska Constitution and the 5th and 14th Amendments of the U. S. Constitution.

4. FEDERAL INCOME TAX RETURNS IN THE HANDS OF THE UNITED STATES ARE PRIVILEGED IN A SUIT BETWEEN PRIVATE INDIVIDUALS.

This has been so determnied in a suit by the Courts of the United States in the case of *O'Connell v. Olson,* 10 F. R. D. 142, 143 (D. C. N. D. Ohio):

> "1. Federal Civil Procedure in private civil actions, income tax returns are confidential information between taxpayer and government and should not be open to inspection under rule relating to discovery and production of documents and things for inspection. Federal Rules of Civil Procedure, Rule 34, 28 U. S. C. A.; 2626 U. S. C. A. # 55."
>
> "Documents which have been declared confidential by federal departments' rulings are not open to discovery under rule dealing with discovery and production of documents and things for inspection, 28 U. S. C. A."
>
> "The Internal Revenue Code, 26 U. S. C. A. # 55 and the regulations issued thereunder provide, that tax returns shall be confidential and disclosed only upon application of plaintiff or his attorney in fact. No provision is made, for the production of such returns upon order of a Federal Court until such provision is made, this section of the Court has been and is of the opinion that such returns are in private Civil Actions, confidential information between the taxpayer

and the Government and should not be open to inspection under Rule 34, Federal Rules of Civil Procedure, 28 U. S. C. A. Such a ruling is in accord with previous holdings that documents which have been declared confidential by Federal Department rulings are not open to discovery under Rule 34. 2 Moore's Federal Practice 2641 F. N. I.

"Such ruling will have no serious consequence as the information desired can be obtained by intelligent use of other discovery procedure."

The Fifth and Fourteenth Amendments of the United States Constitution protects this petitioner, Paul Rhodes, from being forced to produce the Federal Income Tax Return, of a joint return of a person not a party to the suit and subject himself to prosecution under Section 7213 of the Federal Internal Revenue Code, and the Trial Court was in error in ordering the production of non-existent copies of Federal Income Tax Returns, and in dismissing appellant's Cause of Action, and overruling appellant's Motion for New Trial.

5. When copy of joint income tax return is ordered from the U. S. Treasury, the regulations of the U. S. Treasury require the party ordering copies to fill out form No. RC CHI 240-26 (1-64) further identified as GPO 807 321 and to return the same to the U. S. Treasury. Said form required by the U. S. Treasury so far as pertinent to this law suit reads as follows, to-wit:

"* * * 3. Request for photostats must be signed by taxpayer. Please complete the request on the reverse side and return it to this office. * * *

"REQUEST FOR PHOTOSTATIC COPY OF TAX RETURN

"(If the return was a joint return, both husband and wife must sign this request.)

Please furnish me/us with ——— photostatic copy(s) of my/our income tax return for the year(s) ———
Name(s) as shown on return ———
Street, City and State as shown on return ———
Social Security Number(s) ——— * * *."

Therefore the U. S. Treasury requirement makes the signature of both taxpayers a requisite to securing copies of said return. In the case at bar this would require the signature of Augustine J. Rhodes, a person not subject to the jurisdiction of the court and not within the power of this petitioner to force said party to sign, and said joint returns therefore in the hands of the U. S. Treasury, and not in the possession, custody and control of this petitioner, as required by section 25-1267.39, R. R. S. Nebraska 1943, re-issue of 1956. The pertinent part of said statute reading as follows:

> "Upon motion of any party showing good cause therefor and upon notice to all other parties, and subject to the provisions in section 25-1267.22, the court in which an action is pending may (1) order any party to produce and permit the inspection and copying or photographing, by or on behalf of the moving party, of any designated documents, papers, books, accounts, letters, photographs, objects, or tangible things not privileged, which constitute or contain evidence relating to any of the matters within the scope of the examination permitted by section 25-1267.02 and which are in his possession, custody or control; * * *."

The Court will now note that the order of April 21, 1964 as modified by the order of June 1, 1964 (T40) does not require the production of any schedules attached to, made a part of the joint income tax returns of Augustine J. Rhodes and Paul Rhodes for the years of 1958 and 1959 but only requires the production of the personal income tax returns of Paul Rhodes which are non-existent.

Therefore, there was nothing for this appellant to produce, and nothing within his possession, custody or control which he could produce.

CONCLUSION

It is submitted to the Court in conclusion that that question passed on by the Supreme Court of the State of Nebraska is a Federal Question of vital importance to millions of payors and people filing Joint Income Tax Returns in the United States of America, being Federal Income Tax Returns and that the importance of the question to the millions of taxpayers, those filing joint income tax returns outweighs the importance of the approximately six thousand dollars that this petition will lose in the case at bar, and that because of its vital national importance that the federal income tax returns of a joint income tax return of a person not a party to the suit in the hands of the United States remain confidential is one of the reasons your petitioner stood his ground and made a test case of this so the millions of persons filing such returns will know whether the State Court can force them to be published, by making one of the persons that is party to the suit deliver the same for copying and inspection, making the information therein contained available to the competitors and enemies of the person not a party to the suit.

The other important question to be considered by this Court is whether the State Court can require a party to the suit to secure from the United States, for copying and inspection, a joint income tax return of a person not a party to the suit, thus making the party to the suit liable to prosecution under Section 7213 of the Internal Revenue Code, and subject to be fined not more than $1,000 or im-

prisoned not more than one year, or both. It is this contention of the petitioner that the opinion of the Nebraska Supreme Court in so holding violates the 5th and 14th Amendments of the United States Constitution.

That this Court should issue Writ of Certiorari to the Supreme Court of Nebraska and consider and decide these vital, important national questions.

Respectfully submitted,

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APPENDIX A

178 Neb. 757

PAUL RHODES, APPELLANT, V. CHARLOTTE EDWARDS ET AL., APPELLEES.

135 N. W. 2d 453

Filed May 21, 1965. No. 35907.

1. **Actions: Evidence.** A court in which a civil action is pending may require one party to produce a copy of a federal income tax return for inspection and use by an adverse party under section 25-1267.39, R. R. S. 1943.
2. **Evidence.** A person who has made the amount or nature of his income an issue in litigation thereby makes his federal income tax return a legitimate subject of inquiry and he can no longer claim that the relevant information contained in it is confidential or privileged.
3. ———. A party who has not retained copies of his income tax returns can be required to obtain copies from the proper office for use in accordance with the discovery order.
4. ———. The fact that a party's income tax return is joint and not his individually is not a defense to an order to produce. His remedy for any anticipated misuse of the income tax return is by application to the court for a limitation of use of the return.
5. **Constitutional Law: Evidence.** An order to produce copies of income tax returns under section 25-1267.39, R. R. S. 1943, is not violative of the due process clauses of the state and federal Constitutions, or of 26 U. S. C. A., § 7213, p. 228.
6. **Actions: Evidence.** Under the provisions of section 25-1267.44, R. R. S. 1943, a party refusing to obey a discovery order made under section 25-1267.39, R. R. S. 1943, may suffer the dismissal of the action or proceeding.

Appeal from the district court for Morrill County: JOHN H. KUNS, Judge. Affirmed.

Paul Rhodes, pro se.

James L. Macken, for appellees.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, BROWER, SMITH, and MCCOWN, JJ.

CARTER, J.

This is an appeal by the plaintiff from an order of

the district court for Morrill County dismissing plaintiff's petition without prejudice for failure to comply with an order to produce copies of his 1958 and 1959 federal income tax returns.

Plaintiff commenced an action on April 8, 1963, against the defendants on a note dated April 9, 1958, for $6,515.36 and interest upon which a credit for $1,568 was endorsed on October 26, 1958. The defendants' answer and cross-petition alleges that the note was given for a one-half interest in a drugstore in Bridgeport, Nebraska, and the execution of a written partnership agreement which was never consummated by the plaintiff. Defendant Jack Edwards alleged that he assumed the management of the drugstore on February 24, 1958, and continued as manager until October 26, 1958. He contends that the assets in the drugstore on October 26, 1958, were of sufficient value to equal plaintiff's capital investment and the amount of the note in suit. Defendants seek to recoup the amount of the note and counter-claim for damages sustained by plaintiff's breach of contract.

Plaintiff in his reply asserts laches and the statute of limitations as defenses. In addition thereto plaintiff alleges that defendant Jack Edwards purchased the drugstore from a trustee in bankruptcy and borrowed $3,400 from plaintiff to complete payment for the same. Plaintiff further alleges that Edwards conveyed a one-half interest to him on February 25, 1958, and the business was thereafter operated as a partnership until it was dissolved on October 26, 1958, by mutual agreement.

Plaintiff alleges further that he advanced further sums for the operation of the partnership business in the amount of $11,800, one-half of which is a capital investment of Edwards. Plaintiff alleges that an accounting was had and as a result a chattel mortgage on Edwards' half interest was given to plaintiff in addition to his securing a cosignor on the note, Charlotte Edwards being such cosigner, as payment for the amount due. Plaintiff alleges that defendant Jack Edwards is estopped

to deny the partnership and asserts his right to judgment as prayed.

On March 24, 1964, defendants moved for an order, pursuant to section 25-1267.39, R. R. S. 1943, requiring plaintiff to produce and permit inspection of certain specified documents including his federal income tax returns for 1958 and 1959. The order was granted by the trial court. Plaintiff sought a rehearing on the grounds that the federal income tax returns were privileged, that plaintiff did not have copies of said returns, and that defendants' attorney learned of the contents of the returns by unlawful means which amounted to an unlawful search and seizure, contrary to the state and federal Constitutions. The trial court overruled the motion for a rehearing.

On May 11, 1964, plaintiff moved for a vacation of the discovery order on substantially the same grounds as asserted in his previous motion for a rehearing. On June 5, 1964, the trial court modified its previous order by requiring plaintiff to produce only those parts of the 1958 and 1959 federal income tax returns relating to the operation of the drugstore business. The amending order also recites the plaintiff's assertion that he made only joint returns with another person and that he was prohibited by federal law from making the disclosure. The court's order fixed July 6, 1964, as the time in which the income tax returns should be produced. On July 7, 1964, the trial court dismissed plaintiff's petition without prejudice for failure to comply with the discovery order. A motion for a new trial was filed, which was overruled. Plaintiff then perfected this appeal.

It is provided in part by section 25-1267.39, R. R. S. 1943: "Upon motion of any party showing good cause therefor and upon notice to all other parties, and subject to the provisions in section 25-1267.22, the court in which an action is pending may (1) order any party to produce and permit the inspection and copying or photographing, by or on behalf of the moving party, of any designated documents, papers, books, accounts, letters,

photographs, objects, or tangible things, not privileged, which constitute or contain evidence relating to any of the matters within the scope of the examination permitted by section 25-1267.02 and which are in his possession, custody, or control; * * *."

Plaintiff contends the trial court erred in requiring him to produce copies of his 1958 and 1959 federal income tax returns for the reason that they are privileged and specifically excluded by the provisions of section 25-1267.39, R. R. S. 1943. A court in which a civil action is pending may require one party to produce a copy of a federal income tax return for inspection by an adverse party under the rules or statutes which deal with discovery procedures. Cases supporting this holding are collected in section 3 of the Annotation on Discovery—Income Tax Returns, 70 A. L. R. 2d 244.

The effect of the privilege provided by federal statute is stated in Kingsley v. Delaware, Lackawanna & Western R.R. Co., 20 F. R. D. 156, as follows: "The purpose of the statute is to prevent the disclosure of confidential information to those who do not have a legitimate interest in it. But once a person has made the amount of his income an issue in litigation it becomes a legitimate subject of inquiry and he can no longer claim that the information contained in his returns is confidential." See, also, Connecticut Importing Co. v. Continental Distilling Corp., 1 F. R. D. 190; Currier v. Allied New Hampshire Gas Co., 101 N. H. 205, 137 A. 2d 405, 70 A. L. R. 2d 237; Bush v. Chicago, B. & Q. R.R. Co., 22 F. R. D. 188.

Plaintiff asserts that he had no copies of his federal income tax returns for 1958 and 1959 and they were not therefore within his possession, custody, or control within the meaning of section 25-1267.39, R. R. S. 1943. Copies of a taxpayer's income tax returns are in his possession and control within the meaning of the statutes, where he does not have copies but can obtain them from the federal government on application. Conner v. Gilmore, 45 Del. 184, 70 A. 2d 262; Gould v. Sullivan,

54 N. Y. S. 2d 430; Mandell v. Yellow Cab Co. (Ohio), 170 N. E. 2d 296; Kingsley v. Delaware, Lackawanna & Western R.R. Co., *supra;* Reeves v. Pennsylvania R.R. Co., 80 F. Supp. 107; Paramount Film Distributing Corp. v. Ram, 91 F. Supp. 778.

Some contention is made that plaintiff is excused from compliance with the court's discovery order because no provision was made for the cost of the copies of the income tax returns by the defendants. No demand was made for such expenses in the trial court. While the trial court may provide for the payment of such expenses in advance, it is not required to do so. Unless demand for the expenses is made, the plaintiff cannot be excused from compliance on that ground. In any event, the question of expenses was not an issue in the district court nor is it assigned as error on this appeal.

Plaintiff contends that he made no individual income tax returns in 1958 and 1959. He argues that his returns were joint ones with his wife, and that he is prohibited by law from disclosing the contents of the joint returns. The trial court limited its order to information relating to the drugstore. It stands to reason that a taxpayer may not avoid a discovery order merely because he is a party to a joint return. The trial court has authority to protect against an unreasonable use of the returns, which it did in the instant case. Even though his return is a joint one, it is still his return and must be produced. His remedy, if improper use is anticipated, is to invoke the powers of the court to insure proper use. Plaintiff cites no case authority on the question. In Brei v. Sharon Steel Corp., 8 Pa. D. & C. 2d 483, the court stated with reference to a joint tax return made by a husband and wife: "Plaintiff further contends that the returns are irrelevant for the reason that they are the joint returns of himself and his wife. However, the mere fact that the returns contain certain irrelevant matter would not bar their use as evidence when they also contain facts that are clearly relevant." Where the trial court has limited the discovery order, as here, to matters relevant to the

issues before the court, it is not an excuse for noncompliance with the discovery order that plaintiff's income tax return was joint and not his individually.

The plaintiff refused to comply with the trial court's order to produce copies of his income tax returns for 1958 and 1959, and the trial court dismissed his action without prejudice. Plaintiff contends that the action of the trial court is violative of Article I, section 3, Constitution of Nebraska, the Fifth and Fourteenth Amendments to the Constitution of the United States, and to 26 U. S. C. A., § 7213, p. 228.

It is provided in part by section 25-1267.44, R. R. S. 1943, as follows: "(2) If any party * * * refuses to obey * * * an order made under section 25-1267.39 to produce any document * * * the court may make such orders in regard to the refusal as are just, and among others the following: * * * dismissing the action or proceeding or any part thereof, * * *." We point out that a discovery statute without means of enforcement by the trial court would be of little value. The statute specifically authorizes a dismissal of the action for failure to comply with a discovery order. Plaintiff had every opportunity to comply and refused to do so. The dismissal of the action without prejudice is a common and recognized method of enforcing its orders. Plaintiff knew, or should have known, that he could not persist in refusing to comply with the court's order, after hearing, without suffering the penalties with which the court is empowered in enforcing its discovery orders.

The holding that federal income tax returns are not privileged when material to the issues in an action or proceeding, that the fact that such returns jointly made with another is not a defense, and that such returns in the custody of the federal government are in his possession and control within the meaning of section 25-1267.39, R. R. S. 1943, eliminates any question as to due process under the state and federal Constitutions. To otherwise hold would permit the plaintiff to engage in

litigation and to suppress evidence material to a proper decision of the case.

We find no error in the record. The judgment of the district court is correct and it is affirmed.

AFFIRMED.

APPENDIX B

Order Overruling Motion for Rehearing

This cause coming on to be heard upon motion of appellant for a rehearing herein, was argued by counsel and submitted to the court; upon due consideration whereof, the court finds no probable error in the judgment of this court heretofore entered herein. It is, therefore, considered, ordered and adjudged that said motion for rehearing be, and hereby is, overruled and a rehearing herein is denied.

APPENDIX C

Stay of Issuance of Mandate

This cause coming on to be heard upon application of appellant for stay of issuance of mandate was submitted to the court; upon due consideration whereof, it is by the court ordered that said application be, and it hereby is, sustained; and issuance of mandate is stayed until October 2, 1965.